IN THE SUPREME COURT OF THE UNITED STATES

October 1975 Term

No. 75-1293

DANIEL L. EDWARDS, JR., PETITIONER

V

THOMAS C. REED, SEC'TY OF THE AIR FORCE, ET AL.,

PETITION FOR WRIT OF CERTRIORARI TO
UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

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THE UNITED STATES COURT OF APPEALS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Daniel L. Edwards, Jr., the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Sixth Circuit of Ohio, entered in the above-entitled case on November 25, 1975.

OPINIONS BELOW

The Order and Opinion of the United States Court of Appeals, Sixth Circuit is unreported and is set forth in Appendix A, hereto, infra, pages 6 and 7. The Judgment of the United States Court of Appeals, which is appealed from is set forth in Appendix A hereto, infra, page 8. The Judgment and Opinion of the United States District Court, Southern District of Ohio, which was sustained by the Court of Appeals is set forth in Appendix A hereto, infra, pages 9 through 13.

JURISDICTION

The Judgment of the United States Court of Appeals, Sixth Circuit, was entered on October 6, 1975. A timely Petition for Rehearing was denied on November 25, 1975, Appendix A, page 8. The Judgment of the Supreme Court of the United States of America is invoked under 28 U.S.C. Section 1254 (1), 42 U.S.C. Section 1984, and 42 U.S.C. Section 2000 (e)-16 (c).

QUESTIONS PRESENTED

1. Whether the District Court lacked jurisdiction in the subject matter under 42 U.S.C. Section 2000 (e)-16 (c).

2. Whether the action was time-barred by delay in filing under 42 U.S.C. Section 2000 (e)-16 (c).

STATUTES

42 U.S.C. 2000 (e)-16 (c), Civil Action by Party Aggrieved.

Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717 (a) (subsec. (a) of this section), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478, or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit until such time as final action may be taken by a department, agency or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in Section 706 (42 USC 2000e-5), in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

STATEMENT OF THE CASE

This case arose by reason of an appeal of the petitioner of his removal from a permanent civil service position with the United States Government. On May 17, 1973, the petitioner received a letter from the Civil Service Commission informing him of a Decision adverse to him and advising him of a statutory right to file a civil action within the 30 day period. The petitioner who did not have funds at that time to hire an attorney, wrote a letter to the Clerk of United States District Court, Southern District of Ohio, dated June 14, 1973, requesting that his case be filed and that he be appointed counsel and that Court fees be waived as provided by statute. The Clerk assigned a case number upon receipt of the petitioner's letter and on July 13, 1973 the Court denied the petitioner's request to proceed in forma pauperis. The Order of denial contained the assigned case number. Thereafter the petitioner, using the charity of his relatives, hired his present attorney who filed a formal complaint under the previously assigned case number on Sept. 20, 1973. The United States District Court dismissed petitioner's complaint on the grounds that it lacked jurisdiction over the suit under their doctrine of sovereign immunity and also on the grounds that the action was time - barred under 42 U.S.C. Section 2000 (e).

REASON FOR GRANTING WRIT

The problems peculiar to this case will arise in many instances where the petitioner, who was formerly a GS-12, loses his job and is in such heavy debt that he could not obtain an attorney within thirty days after the time he had exhausted his administrative appeal. There is an inherent conflict between Title VII's thirty day stautory limit for filing a civil action after receiving notice of a right to sue and its provision giving a

complainant the statutory right to request a Court appointed attorney and the waiver of fees. See Houston vs General Motors Corp., 477 F 2d 1003 (8th Cir 1973); Harris vs Walgreen's Distribution Center, 456 F 2d 588 (6th Cir 1972); Prescod vs Ludwig Industries, 325 F Supp. 414 (ND Ill 1971); Beckum vs Tennessee Hotel, 341 F Supp. 991 (WD Tenn 1971 , Austin vs Reynolds Metal Co., 327 F Supp. 1145 (ED vs 1970); McQueen vs E.M.C. Plastic Co., 302 F Supp 881 (DC Tex 1969); Pace vs Super Value Stores, Inc., 55 FRD 187 (1972), Reyes vs Missouri - Kansas - Texas RR Co., 53 FRD 293 (1971). In this instance the petitioner wrote a letter to the Clerk of the District Court within thirty days of receipt of the Civil Service Commission's Decision.

It is the Petitioner's contention that this Court ought to clearly set forth that any alleged indigent who takes action under 42 U.S.C. 2000 (e)-16 (c) has satisfied the thirty day statutory limit for filing a civil action under Title VII and especially where the Court's Order assigning counsel and waiving fees, or denying for the alleged indigent, as in this case indicates a file number assigned to the letter of complaint. Alleged indigents ought not to be required to file formal pleadings if they make a request to the Court as did the petitioner within the thirty day period. The petitioner can find no case in this Court clearly delineating the rights of alleged indigents proceeding under 42 U S C 2000 (e).

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

William J. Davis
Counsel for Petitioner
855 East Long Street
Columbus, Ohio 43203
(614) 253-8503

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served by U. S. mail postage prepaid, this 23rd day of February 1976 upon Robert Bork, Solicitor General, Department of Justice, Room 5612, Washington D. C. 20530.

William J. Davis

No. 75-1160

FILED
OCT 6 - 1975
JOHN P. HEHMAN, Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOHN P. HEHMAN, Clerk

DANIEL L. EDWARDS, JR.,

Plaintiff-Appellant,
vs.

ROBERT SEAMANS, Secretary of The Air Force,
Defendant-Appellee.

ORDER

Before: EDWARDS, CELEBREZZE and LIVELY, Circuit Judges.

On receipt and consideration of an appeal in the above-styled case, and

Noting from the briefs, records and oral argument that the District Court dismissed this cause of action on pleadings on the grounds 1) that the court lacked jurisdiction and 2) that the action was time - barred by delay in the filing of same; and

Noting further that plaintiff was discharged on April 23, 1962; that he was rehired and again discharged in December of 1971; and

Further noting that his Civil Service complaints were finally denied on May 4, 1973, and that on that date he was notified that he had a right to file a complaint in the United States District Court within thirty days; and

"APPENDIX A"

Further noting that his complaint was actually filed September 20, 1973, four and one-half months after final administrative denial and a year and a half after the effective date of the 1972 amendments to the Equal Employment Opportunity Act (March 24, 1972),

Now, therefore, the judgment of the District Court is affirmed for the second of the two reasons relied upon by the District Judge. See 42 U.S.C. 2000e - 16 (c).

Entered by order of the Court

_____

Clerk

"APPENDIX A"

No. 75-1160

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCCUIT

FILED
NOV 25 - 1975
JOHN P. HEHMAN, Clerk

DANIEL L. EDWARDS,

Plaintiff-Appellant,

vs.

ROBERT SEAMANS, et al.,

Defendants-Appellees.

ORDER

BEFORE: EDWARDS, CELEBREZZE and LIVELY, Circuit Judges.

On receipt and consideration of a petition for rehearing in the above - styled case; and

Noting all petitioner's arguments concerning the facts in the case and preceiving no fact which would serve to toll the statutory limitation beyond a point of 30 days after July 12, 1973,

Now, therefore, said petition for rehearing is hereby denied.

Entered by order of the Court

Clerk

"APPENDIX A"

"APPENDIX I"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED

OCT 30 - 1974

JOHN D. LYTER, Clerk

DANIEL L. EDWARDS,

Plaintiff,

v.

ROBERT SEAMANS, et al.,

Civil No. 4475

Defendants.

JUDGMENT

This action came on before the Court, the Honorable Carl B. Rubin, United States District Judge, presiding, upon the motion of Defendants for dismissal under Rule 12(b), Fed. R. Civ. P., by asserting that the Court has no subject matter jurisdiction over this action, and a decision by the Court thereon having been filed on July 22, 1974, now therefore, in accordance therewith,

IT IS ORDERED AND ADJUDGED that the plaintiff herein take nothing, that this action is DISMISSED and that the defendants, Robert Seamans, et al., recover of the plaintiff, Daniel L. Edwards, their costs of action.

Done at Dayton, Ohio July 22, 1974

JOHN D. LYTER, CLERK

Rebecca J. Ellis

"APPENDIX A"

"APPENDIX II"

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

FILED
OCT 30 - 1974
JOHN d. LYTER, Clerk

DANIEL L. EDWARDS,

Plaintiff,

v.

Civil No. 4475

ROBERT SEAMANS, et al.,

Defendants

OPINION AND
JUDGMENT ORDER

This is a civil action in which plaintiff, Daniel L. Edwards, seeks declaratory and injunctive relief against the Secretary of the Air Force Equal Employment Opportunity Counselor, and other Air Force Officers.

Edwards, a Caucasian, claims that in the course of his civilian employment at Wright-Patterson Air Force Base, he was discriminated against on the basis of race and religion, culminating in his dismissal from two separate jobs. He also alleges that the procedure followed in processing his intra - agency discrimination complaints violated his First, Fifth, and Ninth Amendment rights entitling him to reinstatement to his former position, back pay, and attendant retirement benefits. Jurisdiction is invoked under the First, Fifth, and Ninth Amendments to the United States Constitution, 5 U.S.C. 702-706, 28 U.S.C. 1331, 1343 (4), 1391 (e) and 2201 et seq., as well as 42 U.S.C. 2000e.

The defendants have moved for dismissal under Rule 12(b), Fed. R. Civ. P., by asserting that the Court has no subject matter jurisdiction over this action. A consideration of the history of this dispute is necessary for the disposition of the Government's motion.

"APPENDIX A"

From 1942 until 1961, plaintiff apparently performed his duties as a GS-12 satisfactorily and without strife with his superiors. In June and September of 1961, plaintiff claims that his military supervisors asked him to donate money to church fund drives. Because of retaliations which flowed from his refusal to donate, and the denial of a requested hearing to investigate discrimination against black job applicants, plaintiff filed several complaints with the Air Force Logistics Command Inspector General. He was denied hearings on these complaints, and was discharged in April of 1962. Subsequently, he secured a lesser position at the Base but was again discharged in 1971. Plaintiff continued to file complaints with the Chief Equal Employment Opportunity Counselor concerning the misdeeds committed against him up until 1973. All of these complaints were dismissed without hearing. Plaintiff took three separate appeals to the Civil Service Commission Board of Appeals and Review. Their final decision upheld the Equal Employment Opportunity Officer's rejection of plaintiff's last complaint under the authority of 5 CFR 713.215 and 713.231 (b) and advised the plaintiff of his right to file a civil action under 42 U.S.C. 2000e-16 within thirty days of receipt of their opinion.

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§ 713.215 states in part as follows:

The head of the agency or his designee may reject a complaint which was not timely filed and shall reject those allegations in a complaint which. . .set forth identical matters as contained in a previous complaint filed by the same complainant which. . .has been decided by the agency.

§ 713.215 (b) states in pertinent part:

A complainant may not appeal to the Commission when the issue of discrimination giving rise to the complaint is being considered, or has been considered, in connection with any other appeal by the complainant to the Commission.

"APPENDIX A"

A copy of the final decision of the Board, dated May 4, 1973 accompanied a request by plaintiff filed June 15, 1973 to proceed in forma pauperis in this action (the request was denied July 12, 1973); the complaint initiating this suit was filed September 20, 1973.

We need not and do not reach the merits of the plaintiff's charges, for it is clear from the facts of his complaint that this Court lacks subject matter jurisdiction over this suit under the doctrine of sovereign immunity. A basic axiom of federal judicial review is that the United States, either as a party or through its officers, cannot be sued unless it has consented to be sued. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949). A suit is against the sovereign if:

> . . .'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration'. . .or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'
> Dugan v. Rank, 372 U.S. 609, 620 (1963).

Such is the case here where Plaintiff seeks declaratory and injunctive relief including a money judgment.

The enabling provisions contained in the Equal Employment Opportunity Act of 1972 do allow for the relief sought against the Air Force, but plaintiff has not met the statute's mandates. The language of 42 U.S.C. s 2000 (e) - 16 clearly provides that:

> within thirty days of receipt of notice of final action taken by a department agency, or unit. . .or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit. . .an employee . . .may file a civil action. . .

Interpreting identical time limits contained elsewhere in the Act, the Sixth Circuit has held that:

> The permissive word 'may' refers to the option of the aggrieved party to bring a lawsuit, not to a discretion in

the Court to receive the case following expiration of the 30 days.
Goodman v. City Products Corporation, Ben Franklin Div., 425 F. 2d 702, 703 (6th Cit. 1970).

Even accepting the averments of the complaint as true plaintiff's claims must be rejected. Such allegations are primarily directed at events which transpired in 1962 and the relief sought would involve reinstatement to the GS-12 position which plaintiff held at that time. Under the authority of Place v. Weinberger, 42 U.S.L.W. 2595 (6th Cir. 1974), 42 U.S.C. 2000 (e)-16 is only prospective in nature, having no application to activities occurring before its passage.

It being apparent that this suit is barred under 42 U.S.C. 2000 (e), plaintiff's complaint as it now stands leaves him without a remedy against the Government. Assuming arguendo that plaintiff's allegations of constitutional deprivation under the First, Fifth, and Ninth Amendments are not wholly insubstantial, this Court has no jurisdiction under 28 U.S.C. 1331 or 28 U.S.C. 1343 (4) to grant the requested relief. These jurisdictional statutes do not create actionable rights. They merely vest in the Federal courts the power to adjudicate viable causes of action. Since neither section manifests a waiver by the United States of its sovereign immunity, neither section grants authority to decide these claims. Anderson v. United States, 229 F. 2d 675 (5th Cir. 1956); Cotter Corporation v. Seaborg, 370 F. 2d 686 (10th Cir. 1966); Commonwealth of Kentucky Ex. Rel. Hancock v. Ruckelshaus, 362 F. Supp. 360 (W.D.Ky. 1973); Smallwood v. U.S., 358 F. Supp. 398 (E.D.Mo. 1973), aff'd. 486 F. 2d 1407 (8th Cir. 1973). Jurisdiction cannot be founded on 5 U.S.C. 702 - 706 for the same reasons. As was stated in Sierra Club v. Hickel, 467 F. 2d 1048(6th Cir. 1972), cert. den. 411 U.S. 920, the Administrative Procedure Act does not waive sovereign immunity in an action involving officers of the Executive Branch. See also, Bramblett v. Desobry, 490 F. 2d 405 (6th Cir. 1974); Commonwealth of Kentucky Ex. Rel. Hancock v. Ruckelshaus, supra. Nor does the Declaratory Judgment Act afford jurisdiction in this matter. The rationale of a comparable case is dispositive:

"APPENDIX A"

> . . .by virture of Plaintiff's theory of the case a decision by this Court concerning the validity of the discharge necessarily involves an adjudication of the claim for back wages. . .That the complaint is cast in terms of a declaratory judgment action cannot alter the fact that what in substance is sought is a money judgment against the United States for back pay in excess of $10,000. Carter v. Seamans, 411 F. 2d 767, 771 (5th Cir. 1969), cert. den. 397 U.S. 941.

Plaintiff's other jurisdictional invocations under the First, Fifth and Ninth Amendments and 28 U.S.C. 1391 (e), merit little discussion. It is well settled that constitutional amendments do not confer jurisdiction, nor does a statute governing venue. Weaver v. Kelton, 357 F Supp. 1106 (E.D. Texas 1973).

For the reasons stated above, the Government's motion is GRANTED, and the complaint is therefore DISMISSED without prejudice.

Let Judgment Enter In Accordance With The Foregoing.

Carl B. Rubin
United States District Judge

"APPENDIX A"

1343 Civil Rights and Elective Franchise - The District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person;

(4)
To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

1391 Venue Generally - (e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendent in the action resides, or (2) the cause of action arose or (3) any real property involved in the action is situated or (4) the plaintiff resides if no real property is involved in the action.

"APPENDIX B"

No. 75-1293

In the Supreme Court of the United States

OCTOBER TERM, 1975

DANIEL L. EDWARDS, JR., PETITIONER

v.

THOMAS C. REED, SECRETARY OF THE AIR FORCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1293

DANIEL L. EDWARDS, JR., PETITIONER

v.

THOMAS C. REED, SECRETARY OF THE AIR FORCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. In April 1962, after 19 years of federal service, petitioner was discharged from his civilian job as a GS-12 Missile Inspector at the Air Force Logistics Command, Wright-Patterson Air Force Base, because of unsatisfactory performance of his duties. Petitioner was later employed by the Air Force as a WG-2 Janitor but was removed from that position in December 1971.

In 1969, petitioner complained to the Air Force that his 1962 discharge was based on religious discrimination. The Civil Service Commission's Board of Appeals and Review (BAR) affirmed the Air Force's determination

that petitioner's complaint was untimely and not in compliance with applicable procedures (C.A. App. 1-5).[1]

Petitioner thereafter filed additional administrative complaints alleging discrimination by Air Force personnel on the basis of his race, religion, and national origin. After an investigation and a formal hearing, the Air Force rejected the complaints, finding that the evidence did not support petitioner's allegations of discrimination. In September 1972, the BAR sustained the Air Force decision (C.A. App. 6-11).

Petitioner had, in the meantime, filed six additional complaints alleging that Air Force personnel were engaged in a conspiracy to deny him reemployment because of his race, religion, and national origin. The Air Force rejected each of the complaints on the ground that the evidence did not support petitioner's allegations of discrimination. On February 7, 1973, the BAR again sustained the Air Force decision (C.A. App. 12-20), finding that "[t]here is no evidence of record that complainant has been treated any differently than other employees would have been treated under the same circumstances" (*id.* at 19).

In January 1973, while petitioner's third appeal was pending before the BAR, he filed yet another administrative complaint reiterating the allegations of previous

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[1]"C.A. App." refers to the appendix to the government's brief in the court of appeals, a copy of the relevant portions of which we are lodging with the Clerk of this Court.

We are also lodging the following documents, to which we refer later in this memorandum: (1) Letter dated May 4, 1973, from Civil Service Commission, Board of Appeals and Review, to petitioner. (2) Letter dated June 14, 1973, from petitioner to the district court. (3) Order of the district court filed July 12, 1973. (4) Letter dated August 11, 1973, from petitioner to the district court. (5) Affidavit of petitioner dated May 24, 1973, filed in the district court on August 13, 1973. (6) Petitioner's formal complaint, filed September 20, 1973.

complaints. The Air Force rejected the new complaint on the ground that its allegations had already been considered and rejected in the previous Air Force decision. The BAR affirmed on May 4, 1973, finding that petitioner's allegations were identical to those made in prior complaints and that the allegations were for that reason properly rejected by the Air Force under 5 C.F.R. 713.215.

2. Petitioner claims that he received the BAR's letter of May 4, 1973, on May 17, 1973 (Pet. 3). On June 15, 1973, he filed a letter in the United States District Court for the Southern District of Ohio requesting that his "case be heard by your court with waiver of court fees" and that an attorney be appointed to represent him. The letter attached the BAR's May 1973 decision.

On July 12, 1973, the district court denied the application for waiver of court costs "inasmuch as petitioner is now employed and able to retain private counsel * * *." On August 13, 1973, petitioner filed another letter in the district court stating his intention to proceed without waiver of costs. Attached to the letter was a ten-page affidavit reciting numerous allegations of discrimination relating to petitioner's 1962 discharge, his subsequent efforts to obtain reemployment, and the Air Force's processing of his various discrimination complaints (of which, he alleged, there were more than 108 (p. 3)). The affidavit concluded by requesting that the court "review and act on all of my written discrimination complaints" (p. 10). Petitioner asked to be reinstated with back pay (*ibid.*).

On September 20, 1973, petitioner filed a formal complaint, signed by counsel, in which he alleged that his 1962 and 1971 discharges from Air Force civilian employment were based on "religious and racial prejudice" (p. 2). The complaint sought reinstatement for petitioner in the

GS-12 position he held in 1962, together with back pay and other entitlements (p. 5). It also sought, pending a hearing on that request, reinstatement to the janitor position from which petitioner was discharged in 1971 (*ibid.*).

3. The district court dismissed the complaint for lack of subject matter jurisdiction (Pet. App. 10-14). The court of appeals affirmed, holding that the complaint was not filed within the 30-day period allowed by 42 U.S.C. (Supp. IV) 2000e-16(c) (Pet. App. 6-7).

4. Petitioner argues that his first letter, seeking waiver of costs and appointment of counsel, "satisfied the thirty day statutory limit for filing a civil action under Title VII" (Pet. 4). That contention rests on the premise—apparently accepted, at least *arguendo*, by both courts below—that the 30-day period commenced when petitioner received the BAR's letter of May 4, 1973, affirming the Air Force's rejection, on *res judicata* grounds, of his most recent discrimination complaint.

But petitioner's complaint in the district court was "primarily directed at events which transpired in 1962 and the relief sought would involve reinstatement to the GS-12 position which plaintiff held at that time" (Pet. App. 13). His challenge was not to the propriety of the BAR's application of *res judicata* principles in its May 1973 decision but rather to the correctness of its February 1973 decision on the merits of his discrimination claims. The 30-day period within which to file a civil action to review the February decision commenced when petitioner received notice of that decision.

Petitioner does not claim, and the record does not suggest, that his letter of June 15, 1973, requesting waiver of costs, was filed within 30 days after he received notice of the February BAR decision. Consequently, even if the

filing of the letter of June 15, 1973, commenced a "civil action" within the meaning of the statute, the present action was not timely commenced. The judgment of the court of appeals is therefore correct, and further review is not warranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1976.